BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the Matter of the Request for Agency Action of Genwal Resources, Inc. for Review of Division Order 10-A, Crandall Canyon Mine	**REPLY MEMORANDUM IN SUPPORT OF RECONSIDERATION** Docket No. 2010-026 Cause No. C/015/0032

Genwal Resources, Inc. ("**Genwal**"), permittee of the Crandall Canyon Mine Permit No. C/015/0032, by and through their counsel of record, hereby seeks the Board's reconsideration for the limited purposes of approving Genwal's proposed form of bond, and, only if necessary, determining the adequacy of the existing bond already held by the Division in light of the potential new reclamation obligations. Reconsideration on this basis is appropriately within the Board's rules of practice because both of these matters are essential steps when the Board or Division adjusts the amount of an operator's reclamation bond.

I. GENWAL REQUESTS THE BOARD'S APPROVAL OF A "RESTRUCTURED" FORM OF BOND TO SATISFY THE BOARD'S ORDER

For good and practical reasons the Board has assumed the role of the Division in determining the bond adjustment required to address the possibility that short-term water treatment at the Crandall Canyon Mine will become a cost of reclamation before the iron content of the mine water discharge abates. See ¶ 9, Board Order issued March 6, 2012 (Board retains exclusive and continuing jurisdiction of all matters covered by the Order).

Accordingly, it is the Board's responsibility to approve the form of bond proffered by the operator to cover the $720,000 in short-term water treatment costs. In its Petition for Reconsideration, Genwal advised the Board of the form of bond it intends to post to meet the obligation imposed. As the agency setting the amount of bond increase, the Board is also the appropriate agency to determine whether it will accept the operator's proposed form of bond. Genwal believes that no hearing is necessary to approve the form unless the Board wishes to hear the Division's apparent objections to this form of bond, identified in Genwal's Petition as a "restructuring." If this form of bond for short-term water treatment is acceptable, Genwal will postpone its request for a determination of the existing bond's adequacy or filing a petition for bond release until treatment is no longer needed.

II. THE BOARD SHOULD RECONSIDER ITS ORDER BECAUSE THE DEMAND FOR ADDITIONAL BONDING IS UNLAWFUL IN THE ABSENCE OF A FINDING THAT THE CURRENT BOND IS INADEQUATE TO COVER ALL RECLAMATION COSTS

It is undisputed that the Division (or the Board, in this exceptional case) has authority to require adjustment of the bond amount when the permit is revised. Contrary to the Division's position, however, this authority does not exist separate and apart from a determination that the amount already held is inadequate. "In the event that an approved permit is revised in accordance with the R645 rules, the Division will review the bond for adequacy and, if necessary, will require adjustment of the bond to conform to the permit as revised." Utah Admin. Code R645-301-830.440 (emphasis supplied). The bond amount is adequate when it is sufficient to cover the Division's costs of completing the reclamation plan should the operator fail to do so. Utah Code § 40-10-15(1). Requiring and retaining a greater amount exceeds the Division's and Board's authority. See Utah

Admin. Code R645-301-820.351 (limiting bond liability only to actions that are required in the permit.) Bond adjustment, such as that ordered by the Board in this case, must therefore occur in tandem with a review of the adequacy of the existing bond amount.

In this matter, the Board found that the reclamation plan must include treating the water discharge, and that the cost to the Division, should it be required to complete the reclamation plan, would include up to three years of treatment expenses, i.e., $720,000.[1] The logical next step in this process would be an inquiry into whether existing bonding is sufficient to cover this cost. In this matter, neither the Division nor the Board has undertaken this essential review. Because the Board's Order makes its determination of bond adjustment without reference to the amount of bond already in place, its finding of bond inadequacy, if left unchanged, would be arbitrary and capricious (and hence, unlawful) because it omits an essential part of the determination.[2] In light of the Division's strong (although unjustified) objections to Genwal's proposed form of bond, Genwal requests that the Board grant the reconsideration request and determine the amount of additional bond to be posted, if any, over and above that already in place.

It is no answer to assert that Genwal's existing reclamation bond and the new sum required for short-term water treatment are separate and distinct financial assurances. The relevant statute speaks of the reclamation bond in the singular, not plural. See Utah Code § 40-10-15(1) (5). While the Board's rules provide for multiple bonds when

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[1] Contrary to the Division's unsupported allegations, the Board appropriately determined the likely short-term duration of the need for water treatment after carefully weighing expert reports provided by the Division and Genwal. Findings ¶ ¶ 56-71, Board Order, March 6, 2012.

[2] The Court of Appeals authority cited by the Division is irrelevant because it addresses the plaintiffs' attempt to add a new claim to their lawsuit in district court after their initial claims were decided. See National Advertising Co. v. Murray City Corp., 2006 UT App. 75, ¶¶ 8–9 (131 P.3d 872). The cited case does not purport to address proceedings before administrative agencies under the Utah Administrative Procedures Act. In any event, Genwal is not offering a new claim for the Board's decision, but merely pointing out that an essential element of the matter before the Board has been left unaddressed.

successive areas will be disturbed and reclaimed, or when the total bond coverage is comprised of various forms or sources of funding, the Division is without authority to require multiple bonds for the purpose of retaining an amount that exceeds the reasonable costs of reclamation. See R645-301-820.110 (incremental bonding); R645-301-820.132 (cumulative bonding).

The Division is also wrong to assert in its Response that the adequacy of the existing bond was an issue beyond the scope of the matter Genwal brought before the Board. Given that the Division's initial Division Order 10-A left the amount of the bond increase unspecified, Genwal can hardly be faulted now for failing to assert in response that the existing bond amount was sufficient. Up to the point where the amount of the bond increase was made known in the Board's March 6, 2012 Order, Genwal could not have argued that existing bonds held by the Division were adequate because that amount was unknown. More importantly, the coal rules place the obligation to make a finding of bond inadequacy squarely on the agency, requiring any bond increase without an underlying finding of bond inadequacy to be found arbitrary and capricious. R645-301-830.410.

III. THE BOARD'S REQUESTED BOND INCREASE MAY BE OFFSET BECAUSE GENWAL IS ENTITLED TO A REDUCTION OF THE BOND AMOUNT WHEN THE ESTIMATED COST OF RECLAMATION DECREASES

Separate from the obligation to consider bond adequacy before increasing the bond amount, Genwal is entitled under the Board's rules to a determination of whether the existing amount held by the Division exceeds what is necessary to meet estimated reclamation costs.

> A permittee may request reduction of the amount of the performance bond upon submission of evidence to the

> Division providing that the permittee' method of operation or other circumstances reduces the estimated cost for the Division to reclaim the bonded area. Bond adjustments which involve undisturbed land or revision of the cost estimate of reclamation are not considered bond release subject to procedures of R645-301-880.100 through R645-301- 880.800.

R645-301-830.430. In this case, Genwal is in possession of information that the existing reclamation bond, apart from short-term water treatment costs, and apart from East Mountain reclamation already performed by the operator[3], significantly exceeds the estimated cost of performing the necessary work. See EIS Cost Estimate, attached to Petition as Exhibit B. This evidence shows that Genwal is entitled to this bond reduction whether or not the Board accepts the form of bond now proposed.[4] If the proposed form of bond for short-term water treatment costs is unacceptable to the Board, Genwal requests a hearing, on reconsideration of the existing matter, on the reasonable costs of reclamation. If the Board finds the proposed form to be acceptable, no further hearing before the Board is required.

Similarly, although Genwal has performed the phase I reclamation requirements at East Mountain, if the Board accepts the proposed form of bond for short-term water treatment, Genwal will defer bond release until treatment is no longer required. The Division asserts in its Response that prior to the bond release, the Division must consider the estimated costs of abating surface water pollution. R645-301-880.210; Response at 4. Therefore, following the Division's reasoning, if bond release is unavailable until water

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[3] Performance of Phase I reclamation qualifies the operator for a bond release up to 60% of the $407,275 bonded cost of East Mountain reclamation.

[4] In its Petition for Reconsideration, Genwal identified this information as "new evidence" justifying reconsideration under the relevant Board rule. It is more accurate to identify it as evidence that the Board might consider when making the necessary finding concerning the adequacy of the existing bond. Genwal requests that the Board accept the audit report provided with Genwal's Petition as the "abstract" of evidence mentioned in the Board's rule governing reconsideration. R641-110-200.

treatment is no longer required, the excess bond coverage should be credited to secure the $240,000 prepaid operating cost account as proposed by Genwal.

IV. THE BOARD SHOULD GRANT THE RECONSIDERATION PETITION IN ORDER TO CORRECT A POTENTIALLY UNFAIR FINANCIAL BURDEN ON GENWAL

Even if the bond adjustment were not unlawful absent a determination of adequacy, as a matter of policy the Board should require such a determination in order to control the demands made on operators' capital when bond adjustments are considered. The Division's position, made abundantly clear in its Response, is that it need not inquire into whether it already has enough of the operators' money before it demands even more. Further, the Division has made clear its position that it will not release the existing bond until the costs of abating surface water pollution have been addressed. Response at 4. The Board should take this opportunity to correct this potentially abusive practice by requiring an appropriate inquiry into the existing bond amount before demanding a bond increase. Because such a result would be entirely unfair to Genwal, addressing this issue on reconsideration is appropriate even if it were not an essential part of the bond adjustment decision, as set forth above.

CONCLUSION

Genwal submits its Request for Reconsideration for the limited purpose of obtaining the Board's approval of a form of restructured bond that provides for additional cash bonding in the amount of $480,000 for two years of future costs, plus the Division's entitlement upon default to the $240,000 account holding the current year's prepaid operating costs. Genwal has provided evidence that the existing reclamation bond significantly exceeds the $240,000 in annual operating costs. Further, the Division is taking the position that the existing bond cannot be released until water pollution is

addressed. R645-301-880.210. Given the Division's apparent opposition to the proposed bond, however, Genwal points out that the Reconsideration is independently necessary to address a failure to determine whether existing bonding is adequate. The absence of this determination renders the Order unlawful, because it omits an essential element of the Decision. Finally, Genwal points out the unfairness of demanding more bonding without determining whether the amount of bonding already in place is sufficient. All of these factors clearly justify the exercise of the Board's discretion under its rules to reopen the matter on reconsideration.

RELIEF REQUESTED

Genwal respectfully requests that the Board Reconsider its Order of March 6, 2012, and modify it as follows:

1. Accept a form of bond for short-term water treatment only consisting of a cash deposit or surety bond of two year's future operating costs in the amount of $480,000, plus a cash account containing the current year's expenses, prepaid each year in the amount of $240,000, naming the Division as beneficiary upon presentation of a Board Order forfeiting the reclamation bond.

2. In the alternative, hold a hearing on how the existing bond should be adjusted to assure coverage of the additional reclamation costs of three year's water treatment.

RESPECTFULLY SUBMITTED this 23rd day of April, 2012.

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **REPLY MEMORANDUM IN SUPPORT OF RECONSIDERATION** were e-mailed on April 23, 2012, to the following:

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